

NCBJ Annual Meeting Report of the 2023-24 NCBJ International Committee

BY MARY JO HESTON, CHAIR

Mid-year three new members were added to the Committee which is currently made up of the following judges: Nancy Alquist (D. Md.), Robert D. Berger (D. Kan.), Jason Burgess (M.D. Fla.), Dan Collins, (D. Ariz.), Ed Godoy (D.P.R.), Beth Hanan (E.D. Wis.), Mary Jo Heston, Chair (W.D. Wash.), David Jones (S.D.N.Y.), Stacey Jernigan (N.D. Tex.), Katharine Sampson (D. Miss.), Greg Taddonio (W.D. Pa.) and Laura Taylor (S.D. Cal.). Everyone on the Committee has actively participated in one or more of the Committee's pending projects, as described below.

The Committee meets monthly to discuss the ongoing projects but has broken into subgroups to work on some of the projects identified in the 2022-23 Report and Recommendations on NCBJ's Future Role within the International Insolvency Community (see NCBJ Website for a copy of the Report). Nancy Alquist and Laura Taylor are working on revising the Committee's Mission Statement in keeping with the areas of focus within the Report and a draft should be available by the time of the Annual Meeting.

Second, Kathy Sampson is heading up the Judiciaries Worldwide (JW) subcommittee along with Nancy Alquist, Dan Collins, and me to start preparing summaries of the key aspects of various countries' insolvency systems for the FJC International Office's website, Judiciaries Worldwide. She has coordinated with Mira Gur-Arie, Director of the FJC International Office who is excited about the Committee's work and will be the ultimate decision maker on the summaries content posted on the JW. We should have the general insolvency law summary and template for going forward on this project by the Annual Meeting. I have reached out to INSOL International to see if we can use their country insolvency law summaries to assist with what ultimately is put on the FJC International website. Once we develop the template for such country summaries, we will be looking for assistance from outside the Committee so watch for an upcoming email seeking assistance from you and your law clerks.

Beth Hanan and Stacey Jernigan are the lead Committee members working on preparing future articles on interesting international and related issues for upcoming Conference News editions. In the Summer Edition Stacey and Dan Collins produced an interesting interview with Jim Peck (S.D.N.Y. Ret.) and Chris Sontchi (D. Del. Ret.) about their post-retirement international work. For the Fall Conference News, Beth has submitted an article on sovereignty issues in bankruptcy of Native American nations and tribes and nations based on the U.S. Supreme Court's decision in *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023).

A significant amount of time has been spent by me and other members of the Committee on the International Program. We have finalized the NCBJ, TMA, ACB and IWIRC co-sponsored International Program scheduled for Tuesday September 17, 2024, titled "Children of a Common Mother" which will provide a detailed comparison of the Canadian and U.S. insolvency laws in various contexts and under different types of cases. See attached brochure. NOTE: that this is a free program for NCBJ and IWIRC participants who we ask to

separately register for using the following link: <https://ncbj.org/civicrm/event/register/?cid=0&reset=1&id=13>. Non-registrants of IWIRC or NCBJ can register for this program for \$150. The separate link will permit you to register for this program even if you have already registered for NCBJ.

The program involves three great panels and includes both Canadian and U.S. insolvency/bankruptcy judges, financial advisors, trustees, and attorneys. The first panel titled “A Tale of Two Insolvent Small Businesses” will compare the issues and likely different outcomes of a case proceeding under subV and a proposal under the Canadian BIA.¹ The materials include a comparison chart of the Canadian and U.S. small business provisions and the small business hypothetical. The second panel will contrast and compare Chapter 11 and CCAA² case issues, including third party releases in light of the U.S. Supreme Court’s recent decision in *Harrington v. Purdue Pharma, L.P.*, 63 U.S. ___, 144 S.Ct. 2071 (2024), the “Texas Two-Step”, the necessity that there be a “reorganization” purpose for Chapter 11 cases, Canadian reverse vesting orders³ and mistakes practitioners make in such cross border cases as well as in and obtaining ancillary relief under Chapter 15 and its Canadian equivalent. The materials for this panel include a chart comparing the Chapter 11 and CCAA statutes and related case law as well as some cases and materials on third-party releases and RVOs and sealing standards. The final panel will compare and contrast the roles and responsibilities of different types of trustees, receivers, examiners and monitors under the Canadian and U.S. system, including the expanded role of Canadian monitors in creditor sponsored plans.

We are in the process of heavily marketing this program which we see as bringing increased value to the main NCBJ program participants and others. This meeting will be the primary focus of the Committee members until September.

¹ BIA refers to the Canadian Bankruptcy and Insolvency Act which has two paths: one a liquidation and another a proposal for consideration and approval by the company’s creditors.

² CCAA refers to the Canadian Companies’ Creditors’ Arrangement Act which is the Canadian version of Chapter 11 though different in certain respects.

³ RVO refers to Reverse Vesting Orders which typically involve selling the shares of a financially troubled debtor company to a buyer where the transaction excludes unwanted assets and liabilities, which excluded assets are transferred, assigned, and vested in a newly formed company (referred to as ‘newco’) as part of a pre-closing reorganization. This process allows the debtor company to offload its liabilities while retaining its most valuable assets similar to a Texas Two-Step.